



DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 251

RIN 0596-AD55

Land Uses; Special Uses; Carbon Capture and Storage Exemption

AGENCY: Forest Service, USDA.

ACTION: Proposed rule; request for public comment.

SUMMARY: The United States Department of Agriculture, Forest Service (Forest Service or Agency), is proposing to amend its special use regulations, which prohibit authorizing exclusive and perpetual use and occupancy of National Forest System lands, to provide an exemption for carbon capture and storage. The Forest Service is also proposing to add a definition for “Carbon capture and storage.”

DATES: Comments on this proposed rule must be received in writing by **[INSERT DATE 60 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Comments, identified by RIN 0596-AD55, should be sent via one of the following methods:

- Federal eRulemaking Portal: <https://www.regulations.gov>. Follow the instructions for sending comments;
- Mail: Director, Lands, Minerals, and Geology Management Staff, 201 14th Street, SW, Washington, DC 20250-1124; or
- Hand Delivery/Courier: Director, Lands, Minerals, and Geology Management Staff, 1st Floor Southeast, 201 14th Street, SW, Washington, DC 20250-1124.

Comments should be confined to issues pertinent to the proposed rule, should explain the reasons for any recommended changes, and should reference the specific section and wording being addressed, where possible. All timely comments, including names and addresses when

provided, will be placed in the record and will be available for public inspection and copying.

The public may inspect comments received on this proposed rule at the Office of the Director, Lands, Minerals, and Geology Management Staff, 1st Floor Southeast, Sidney R. Yates Federal Building, 201 14th Street, SW, Washington, DC, on business days between 8:30 a.m. and 4 p.m.

Visitors are encouraged to call ahead at 202-205-1680 to facilitate entry into the building.

Comments may also be viewed on the Federal eRulemaking Portal at

<https://www.regulations.gov>. In the search box, enter “RIN 0596-AD55,” and click the “Search” button.

FOR FURTHER INFORMATION CONTACT: Mark Chandler, Realty Specialist, Washington Office Lands, Minerals, and Geology Management Staff, 202-205-1117 or mark.chandler@usda.gov. Individuals who use telecommunication devices for the hearing impaired may call the Federal Relay Service at 800-877-8339 between 8 a.m. and 8 p.m., Eastern Time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

The Forest Service administers approximately 74,000 special use authorizations for use and occupancy of National Forest System (NFS) lands for a wide variety of purposes, including powerline facilities, communications facilities, outfitting and guiding, campground concessions, and resorts. The activities and facilities authorized by special use authorizations contribute significantly to the national economy and the social and economic foundation of rural communities.

To obtain a special use authorization for a new use or activity, a proponent must submit a special use proposal which meets two sets of screening criteria in the Agency’s existing special uses regulations at 36 CFR 251.54(e)(1) and (5). If the proposal meets all the screening criteria, the proponent may submit a special use application for evaluation by the Forest Service. Per the existing initial screening criterion at 36 CFR 251.54(e)(1)(iv), the Forest Service may not authorize exclusive and perpetual use and occupancy of NFS lands.

Carbon capture and storage entail injecting and storing carbon dioxide in pore spaces below the surface of the earth. Pore spaces are subsurface geological formations that can be used to store fluids from mining, manufacturing, and other industrial processes. Typically, the United States owns the pore spaces below the surface of NFS lands. Storing carbon dioxide in pore spaces is intended to mitigate greenhouse gas emissions and is performed via Class VI underground injection control wells. Carbon dioxide injected in pore spaces may remain for over 1,000 years after injection and would be tantamount to an exclusive and perpetual use and occupancy if authorized on NFS lands. Therefore, the Forest Service is proposing to amend the initial screening criterion at 36 CFR 251.54(e)(1)(iv) that prohibits authorizing exclusive and perpetual use and occupancy of NFS lands to provide an exemption for carbon capture and storage. The Forest Service is also proposing a definition for “carbon capture and storage” in 36 CFR 251.51.

The United States Environmental Protection Agency (EPA) has excluded carbon capture and storage from classification as a hazardous waste (40 CFR 261.4(h)) if carbon dioxide is captured, transported, and stored in compliance with the requirements for Class VI Underground Injection Control wells and the requirements in 40 CFR parts 144 and 146 of the Underground Injection Control Program of the Safe Drinking Water Act, including the requirements for EPA authorization by rule or by permit. A Class VI Underground Injection Control well is used to inject carbon dioxide into deep rock formations. Before issuing a permit for a Class VI Underground Injection Control well, the EPA conducts a detailed technical review to ensure that the area around the proposed location for the well does not have abandoned wells that could leak carbon dioxide and to determine whether the well would be constructed in a manner that would protect it from seismic activity and from leaking carbon dioxide into the groundwater (40 CFR parts 144 and 146, Underground Injection Control (UIC) Program Class VI Implementation Manual for UIC Program Directors).

The proposed rule would define “carbon capture and storage” as “the capture, transportation, injection, and storage of carbon dioxide in subsurface pore spaces in such a manner as to qualify the carbon dioxide stream for the exclusion from classification as a ‘hazardous waste’ pursuant to United States Environmental Protection Agency regulations at 40 CFR 261.4(h).” Therefore, carbon capture and storage authorized under the proposed rule would not constitute a hazardous waste and would not be inconsistent with the initial screening criterion at 36 CFR 251.54(e)(1)(ix) that prohibits authorizing storage of hazardous substances on NFS lands.

To protect public health and underground sources of drinking water for these wells, including for those that may be sited on NFS lands, the EPA regulates all aspects of the wells, including siting, construction, injection operations, testing and monitoring, emergency response, financial responsibility, and plugging and closure of the wells and injection sites through permitting, site inspections, required reporting, and compliance reviews. The public may comment on proposed permits for Class VI Underground Injection Control wells, as well as request and attend public hearings and in some cases file appeals with EPA’s Environmental Appeals Board regarding permits for Class VI Underground Injection Control wells.

Carbon capture and storage can be used to reduce carbon dioxide emissions to the atmosphere. Possible sources of carbon dioxide include point source emissions from industrial facilities, energy production, and direct air capture from the atmosphere. Authorizing carbon capture and storage on NFS lands would support the Administration’s goal to reduce greenhouse gas emissions by 50 percent below the 2005 levels by 2030.

The proposed rule would not authorize carbon capture and storage on NFS lands. Rather, the proposed rule would exempt proposals for carbon capture and storage from the initial screening criterion prohibiting authorization of exclusive use and occupancy of NFS lands, thereby allowing the Forest Service to review proposals and applications for carbon capture and storage and to authorize proposed carbon capture and storage on NFS lands if, where, and as

deemed appropriate by the Agency. An exemption for the exclusive and perpetual use and occupancy for carbon capture and storage on NFS lands would be consistent with the intent of EPA's Class VI Well permitting requirement for injecting carbon dioxide for the primary purpose of long-term storage. No other type of exclusive and perpetual use and occupancy would be authorized on NFS lands under the proposed rule.

Proposals for underground storage of carbon dioxide would have to meet all other screening criteria, including but not limited to consistency with the applicable land management plan, potential risks to public health or safety, conflicts or interference with authorized uses of NFS lands or use of adjacent non-NFS lands. Accepted applications for carbon capture and storage would be subject to the requisite environmental analysis.

Regulatory Certifications

Regulatory Planning and Review (Executive Orders 12866 and 13563)

Consistent with Executive Order (E.O.) 12866, the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget will determine whether proposed, interim, and final rules that impose, eliminate, or modify requirements on non-Forest Service parties are significant and will review any proposed, interim, or final rules that OIRA has designated as significant. This proposed rule has been designated as nonsignificant by OIRA. E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The Forest Service has developed the proposed rule consistent with E.O. 13563.

Congressional Review Act

Pursuant to Subtitle E of the Small Business Regulatory Enforcement Fairness Act of 1996 (known as the Congressional Review Act) (5 U.S.C. 801 *et seq.*), OIRA has designated this proposed rule as not a major rule as defined by 5 U.S.C. 804(2).

National Environmental Policy Act

This proposed rule would amend the Forest Service’s special use regulations at 36 CFR 251.54(e)(1)(iv), which prohibits authorizing exclusive and perpetual use and occupancy of NFS lands, to provide an exemption for carbon capture and storage. Forest Service regulations at 36 CFR 220.6(d)(2) exclude from documentation in an environmental assessment or environmental impact statement “rules, regulations, or policies to establish service-wide administrative procedures, program processes, or instructions.” The Forest Service’s preliminary assessment is that this proposed rule falls within this category of actions and that no extraordinary circumstances exist which would require preparation of an environmental assessment or environmental impact statement. A final determination will be made upon adoption of the final rule.

Regulatory Flexibility Act Analysis

The Forest Service has considered the proposed rule under the requirements of the Regulatory Flexibility Act (5 U.S.C. 602 *et seq.*). This proposed rule would not have any direct effect on small entities as defined by the Regulatory Flexibility Act. The proposed rule would not impose recordkeeping requirements on small entities; would not affect their competitive position in relation to large entities; and would not affect their cash flow, liquidity, or ability to remain in the market. Therefore, the Forest Service has determined that this proposed rule would not have a significant economic impact on a substantial number of small entities pursuant to the Regulatory Flexibility Act.

Federalism

The Forest Service has considered this proposed rule under the requirements of E.O. 13132, *Federalism*. The Forest Service has determined that the proposed rule conforms with the federalism principles set out in this E.O.; would not impose any compliance costs on the States; and would not have substantial direct effects on the States, on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among

the various levels of government. Therefore, the Forest Service has concluded that this proposed rule would not have federalism implications.

Consultation and Coordination with Indian Tribal Governments

This proposed rule has been reviewed in accordance with the requirements of E.O. 13175, *Consultation and Coordination with Indian Tribal Governments*. E.O. 13175 requires Federal agencies to consult and coordinate with Tribes on a government-to-government basis on policies that have Tribal implications, including regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. The Forest Service has determined that this proposed rule could have substantial direct effects on one or more Tribes and is subject to Tribal consultation per E.O. 13175 and Forest Service Handbook 1509.13. Accordingly, the Forest Service is conducting Tribal consultation on the proposed rule.

Environmental Justice

The Forest Service has considered the proposed rule under the requirements of E.O. 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*. The Forest Service has determined that the proposed rule is not expected to result in disproportionately high and adverse impacts on minority or low-income populations or the exclusion of minority and low-income populations from meaningful involvement in decision making.

No Takings Implications

The Forest Service has analyzed this proposed rule in accordance with the principles and criteria in E.O. 12630, *Governmental Actions and Interference with Constitutionally Protected Property Rights*. The Forest Service has determined that the proposed rule would not pose the risk of a taking of private property.

Energy Effects

The Forest Service has reviewed this proposed rule under E.O. 13211, *Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use*. The Forest Service has determined that the proposed rule would not constitute a significant energy action as defined in E.O. 13211.

Civil Justice Reform

The Forest Service has analyzed this proposed rule in accordance with the principles and criteria in E.O. 12988, *Civil Justice Reform*. After adoption of this proposed rule, (1) all State and local laws and regulations that conflict with this proposed rule or that impede its full implementation would be preempted; (2) no retroactive effect would be given to this proposed rule; and (3) it would not require administrative proceedings before parties may file suit in court challenging its provisions.

Unfunded Mandates

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538), signed into law on March 22, 1995, the Forest Service has assessed the effects of the proposed rule on State, local, and Tribal governments and the private sector. This proposed rule would not compel the expenditure of \$100 million or more by any State, Tribal, or local government or anyone in the private sector. Therefore, a statement under section 202 of the act is not required.

Controlling Paperwork Burdens on the Public

The proposed rule does not contain any recordkeeping or reporting requirements or other information collection requirements as defined in 5 CFR part 1320 that are not already required by law or not already approved for use and therefore imposes no additional paperwork burden on the public. Accordingly, the review provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and its implementing regulations at 5 CFR part 1320 do not apply.

List of Subjects in 36 CFR Part 251

Administrative practice and procedure, Alaska, Electric power, Mineral resources, National forests, Public lands-rights-of-way, Reporting and recordkeeping requirements, and Water resources.

Therefore, for the reasons set forth in the preamble, the Forest Service proposes to amend 36 CFR part 251 as follows:

PART 251—LAND USES

Subpart B—Special Uses

1. The authority citation for part 251, subpart B, continues to read:

Authority: 16 U.S.C. 460l-6a, 460l-6d, 472, 497b, 497c, 551, 580d, 1134, 3210; 30 U.S.C. 185; 43 U.S.C. 1740, 1761–1772.

2. Amend § 251.51 by adding a definition in alphabetical order for “Carbon capture and storage” to read as follows:

* * * * *

Carbon capture and storage—the capture, transportation, injection, and storage of carbon dioxide in subsurface pore spaces in such a manner as to qualify the carbon dioxide stream for the exclusion from classification as a “hazardous waste” pursuant to United States Environmental Protection Agency regulations at 40 CFR 261.4(h).

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3. Amend § 251.54 by revising paragraph (e)(1)(iv) to read as follows.

§ 251.54 Proposal and application requirements and procedures.

* * * * *

(e) * * *

(1) * * *

(iv) The proposed use will not create an exclusive or perpetual right of use or occupancy, provided that the Forest Service may authorize exclusive and perpetual use and occupancy for carbon capture and storage in subsurface pore spaces.

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Natural Resources and Environment.

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